

At a term of the Supreme Court of the State of New York, held in and for the County of Delaware, at Delhi, New York on July 17<sup>th</sup>, 2020.

PRESENT: Hon. John F. Lambert,  
Acting Supreme Court Judge

STATE OF NEW YORK SUPREME COURT  
COUNTY OF DELAWARE

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JOSEPH and DONNA NEMETH,  
VALERIE GARCIA,

Petitioners,

-against-

DECISION & ORDER  
Index No. 2016/0708

K-TOOLING, KUEHN MANUFACTURING CO.,  
VILLAGE OF HANCOCK ZONING BOARD OF  
APPEALS,

Respondents.

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Petitioner filed a motion for an order and judgement (a) declaring and adjudging that respondent Village of Hancock Zoning Board of Appeals ("ZBA") acted in an arbitrary, capricious and illegal manner when, on July 25, 2016, it granted the respondents K-Tooling and Kuehn Manufacturing Co. a use variance with respect to the property located at 396 East Front Street, Hancock, New York; (b) annulling and vacating the July 25, 2016 use variance issued by the Hancock ZBA with respect to the property located at 396 East Front Street, Hancock, New York; (c) permanently enjoining respondents from using the 800 square foot addition to their property at 396 East Front Street, Hancock New York for manufacturing uses or any other use at variance with the R-1 zoning of the Village of Hancock for that parcel; and (d) granting to petitioners such additional relief as the Court deems just, proper and equitable under the circumstances, including the costs and disbursements petitioners have incurred in commencing and maintaining this proceeding.

In support of the motion the Court is in receipt of an Amended Verified Petition with eight Exhibits. The Court received an affirmation in opposition to the cross motions to dismiss and in

support of the amended petition by Jonathan R. Goldman, Esq. dated June 10<sup>th</sup>, 2020, as well as a memorandum of law dated July 10<sup>th</sup>, 2020. The Court received a stipulation between the parties dated June 11<sup>th</sup>, 2020 that states: respondent Hancock ZBA shall file and serve its verified answer to the amended verified petition on or before June 11, 2020; respondent Village of Hancock ZBA shall not be required to re-serve and re-file the certified record of its underlying proceedings in this matter, having already done so when it responded to the original verified petition in this proceeding; respondent Hancock ZBA shall file and serve any cross-motion to dismiss the amended verified petition on or before June 11, 2020; consistent with the return date for the amended verified petition and the Kuehn respondents' cross-motion, the return date for the Village of Hancock ZBA's cross-motion, if filed, shall be July 17, 2020, unless otherwise extended by the Court.

A cross motion to dismiss the amended petition, and in opposition to the petition, was made by respondents K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn. In support of respondent respondents K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn cross motion and opposition to the amended petition, the Court received affirmation and memorandum of law, dated May 11<sup>th</sup>, 2020, by Allan J. Pope, attorney for respondents, K-Tooling, Kuehn Manufacturing Co. and Rosa Kuehn, as well as a reply affidavit dated July 15<sup>th</sup>, 2020. A cross motion to dismiss the amended petition, and in opposition to the petition, was made by respondent Hancock ZBA. In support of respondent Hancock ZBA cross motion and opposition to the amended petition, the Court received affirmation dated May 8<sup>th</sup>, 2020, by Nathan VanWhy, attorney for respondent, Hancock ZBA, with exhibits.

In their motion to dismiss, K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn assert that the petitioners' original Article 78 Petition was filed on August 24, 2016. Rosa Kuehn was not served until March 2, 2020, which is three (3) years, six (6) months and seven (7) days later. These respondents assert that Rosa Kuehn was required to be served within thirty (30) days of the underlying unanimous Hancock ZBA decision duly filed on July 25, 2016. By so asserting, Rosa

Kuehn raises a statute of limitations defense.

In response, petitioners acknowledge that the thirty-day statute of limitations has expired on the petitioners' claims against Rosa Kuehn, however, they assert that those claims are nevertheless timely under the "relation back" doctrine. Under that doctrine, "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced." C.P.L.R. § 203(c). In order to avail themselves of the benefit of the relation back doctrine, the petitioners are required to demonstrate: (1) that the claims arose out of the same occurrence, (2) that the later-added respondents were united in interest with the original respondents, and (3) that the later-added respondents knew or should have known that, but for a mistake by petitioners as to the identity of the proper parties, the proceeding would have been brought against them as well (see *Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 A.D.3d 1474 [3<sup>rd</sup> Dept. 2014]).

The K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn respond by asserting that absent any evidence demonstrating that Rosa Kuehn would be vicariously liable as a matter of law for the acts of the other respondents, petitioners fail to satisfy the second prong of the relation back doctrine. "Although the parties might share a multitude of commonalities, including shareholders and officers, the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand" *Nehnick v. Meadowbrook Assocs.*, 20 A.D.3d 793 (3<sup>rd</sup> Dept. 2005). Rosa Kuehn's interests as a land owner with a properly granted use variance that runs with the land is not the same or even united with the respondent manufacturers or the respondent Hancock ZBA.

Regarding the third prong of the relation back doctrine, the petitioner acknowledges that the failure to serve Rosa Kuehn arose from a mistake as to the identity of the properly suable parties. The petitioner's also acknowledge that if the Court finds that petitioners' mistake is one of law, the Court is bound by precedent to hold that a mistake of law cannot satisfy the third prong of the relation back doctrine. "The fact that a petitioner is aware of the existence of a property owner but fails to realize

that the property owner is legally required to be named in a proceeding is not a mistake contemplated by the relation back doctrine (citations omitted)” *Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 AD3d 1518, 1520 [3d Dept 2017]). Given that petitioner was aware of the respondent’s existence and failed to appreciate that she was legally required to be named in proceedings of this type, petitioner’s reliance on the relation back doctrine is unavailing (see *Matter of Sullivan County Patrolmen’s Benevolent Assn., Inc. v NY State Pub. Empl. Relations Bd.*, 179 AD3d 1270, 1271-1272 [3d Dept 2020]).

In this matter, this is precisely what occurred. Petitioners failed to join Rosa Kuehn as a necessary party. This court and the Appellate Division 3<sup>rd</sup> Department found that she is a necessary party. The petitioners acknowledged that they were well aware of the existence of Rosa Kuehn as the property owner but originally failed to realize that she was legally required to be named in this proceeding. As is set forth in *Matter of Sullivan v Planning Bd. of the Town of Mamakating* supra; *Matter of Sullivan County Patrolmen’s Benevolent Assn., Inc. v NY State Pub. Empl. Relations Bd.*, supra, the Court is bound by precedent to hold that a mistake of law cannot satisfy the third prong of the relation back doctrine. Accordingly, this matter must be dismissed in its entirety.

Respondent Hancock ZBA asserts that as respondent Kuehn demonstrated that the Amended Verified Petition was not timely commenced and that the relation back doctrine does not apply, and the Amended Verified Petition should also be dismissed against the Hancock ZBA. In, *Matter of Sullivan County Patrolmen’s Benevolent Assn., Inc. v NY State Pub. Empl. Relations Bd.*, supra, once the Court found that a necessary party to the proceeding was not timely served, the amended petition must also be dismissed insofar as asserted against the others because the petitioners failed to join a necessary party and they will thereafter be unable to do so. Following that rationale, this Court must dismiss this matter in its entirety.

For these reasons and upon the foregoing papers, it is,


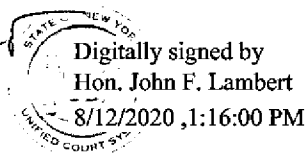
ORDERED that the Amended Verified Petition is DENIED; furthermore it is,

ORDERED that the cross motion to dismiss by K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn is GRANTED; it is

ORDERED that the cross motion to dismiss by Village of Hancock Zoning Board of Appeals is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: August 11, 2020  
Delhi, New York

 Digitally signed by  
Hon. John F. Lambert  
8/12/2020 ,1:16:00 PM  


Hon. John F. Lambert  
Acting Justice Supreme Court

TO: MICHAEL H. SUSSMAN, ESQ.  
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Attorneys for Respondent  
Village of Hancock Zoning Board of Appeals

Entered on August 12, 2020 at 2:13pm Debra A. Goodrich, clerk